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No. 682

Supreme Court of the United States,

OCTOBER TERM, 1945

H. SMITH RICHARDSON
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent

REPLY BRIEF FOR THE PETITIONER

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I

1. The Government asserts that there is no conflict with the decision in *Laird* v. *Commissioner*, 85 F. (2d) 598 (C.C.A. 3d), and that our contention that there is "rests upon the assumption that the Tax Court, in determining the value of the Piedmont stock, gave no consideration to any other factor than the value of the assets owned by the Piedmont company." In support of this position, the Government quotes (Br. 7) certain general language from the opinion of the single judge of the Tax Court. (R. 61.)

This argument, we submit, is purely formal; the very language used by the Tax Court judge shows how formal it is. Here the judge of the Tax Court made very plain the basis on which his valuation was actually made. He

said that that value was obtained "by primarily considering the value of the securities owned by the corporation." Indeed, he went further and said: "*Any other approach* would, in our opinion, be futile." (R. 61; italics ours.) Immediately following this, he said: "*As reflecting the market value of the securities owned by the Piedmont Financial Co.*, its stock was worth $98.08 per share." (R. 61; italics ours.) But the highest value claimed by the Commissioner was $95.509 per share; and the conclusion of the Tax Court judge was then stated that the stock was worth "not less than $95.509 per share." In this context, it can hardly be contended that any factor was actually given any weight by the judge except the value of the underlying assets. He said, quite emphatically, that any other approach would be futile. A valuation reached on that basis is directly contrary to the decision in the *Laird* case.[1] To say that the valuation was not reached on that basis is to allow formal general language to obscure what was actually done, and to ignore the plain meaning of what the Tax Court judge himself said.

II

2. The Government's treatment of the question whether the income of the trusts created in 1932 by the petitioner's wife is to be taxed as a gift by the petitioner is based entirely upon assertion, and a failure to regard the actual

[1] That the distinction is a real one is graphically illustrated by what happened in the *Laird* case. In its first decision (*Laird* v. *Commissioner*, 29 B.T.A. 196), the Board sustained a value of $1760.60 per share. Following the decision of the Circuit Court of Appeals, the Board, speaking through the same member, found the value to be $1000 per share. *Laird* v. *Commissioner*, 38 B.T.A. 926. This final decision was made after taking into account all relevant factors. The striking difference in the values reached shows the clear error in giving weight only to the value of the underlying assets.

facts which are before the Court. The Government says that "The position of the Commissioner, sustained below, is that the trust property was, for tax purposes, the property of the taxpayer." (Br. 10.) But this is in the teeth of the stipulated facts, which show, without dispute, that the petitioner's relation to the property was that he had a power over it. (R. 20-21.) To assert that the petitioner was "the owner" of the property is simply to beg the question at issue. It is precisely the argument which this Court rejected in *Helvering* v. *Safe Deposit & Trust Co.*, 316 U.S. 56.[2]

Where Congress legislates in general terms, as in § 22(a) of the Code, relating to income tax, then it may be correct to talk about a relationship to property as being the equivalent, for tax purposes, of ownership. But where Congress has enacted highly articulated provisions with respect to the effect of powers, that legislation should not be brushed aside with an illusory phrase that cannot be more than "an anodyne for the pains of reasoning."

The Government undertakes to distinguish *Commissioner* v. *Solomon*, 124 F. (2d) 86 (C.C.A. 3d), but fails to point out that the reasoning in that case is completely contrary to the present decision (for which no reasons were given). In the *Solomon* case, as pointed out in the petition, the court said that it was "fundamental" in the cases where the termination of a power had been held to consti-

[2] The following passage is typical of the argument presented by the Government in its brief in the *Safe Deposit & Trust* case:

"Under the rationale of the *Clifford* case, therefore, decedent, who was for all practical purposes the owner of the trust property at the time of his death, was properly treated as its owner for tax purposes." Brief for the Petitioner, p. 37, in *Helvering* v. *Safe Deposit & Trust Co.*, No. 600, October Term, 1941.

This is the same argument as that now made in the present case. But it ignores the whole structure of the statutory provisions applicable to the special problem of powers, and should be no more successful here than it was in the *Safe Deposit* case.

tute a gift "that the person with control over the property was either its owner or donor in the first instance." That reasoning is directly applicable here.

The effort to distinguish the decision in *Edith Evelyn Clark*, 47 B.T.A. 865, and the Commissioner's formal acquiescence in that decision (1942-2 Cum. Bull. 4), serves only to emphasize its applicability here. It is said (Br. 12) that "it was thought that the transaction fell within the provisions of Section 452(c) of the Revenue Act of 1942, made applicable to all calendar years prior to 1943, which were to the effect that a release of a power to appoint before January 1, 1943 (subsequently extended to July 1, 1946), shall not be deemed a transfer of property by the individual possessing such power." That is precisely the provision which is relied on here.

No effort is made to distinguish the case of *Estate of Gertrude Leon Royce*, 46 B.T.A. 1090, in which the Commissioner has also formally acquiesced. 1942-2 Cum. Bull. 16. The mere fact that that case arose under the estate tax is no distinction. The estate tax is imposed on "the transfer of the net estate." Internal Revenue Code, § 810. The gift tax, involved here, is imposed on "the transfer of property by gift." Revenue Act of 1932, § 302(a). In each case the controlling statutory word is the same. There must be a "transfer." In the *Royce* case the decedent was given a power which is not distinguishable from the power here. She could take "such amounts of the principal of the trust estate as she may request in writing, even to the exhaustion thereof." The termination of that power through failure to exercise it was held not to be a *transfer* of the property subject to the power within the proper construction of the statute. In the present case we have the same question. The most that happened was that a power over property held by the petitioner terminated through his failure to exercise it. If such a termination was not a

transfer in the *Royce* case, it cannot consistently be a transfer here. The *Royce* case is not just another decision of the Board of Tax Appeals. It is a decision in which the Commissioner has formally published his acquiescence. 1942-2 Cum. Bull. 16. A decision in conflict with such a publicly announced settled policy merits the consideration of this Court if there is to be anything of consistency in the administration of our tax laws.

3. In its treatment of § 452(c) of the Revenue Act of 1942 (Br. 12-14), the Government does not even mention the clear provisions of the Committee Reports and of the Regulations. This can only be taken as a confession of the difficulty of the Government's position on this point.

The Government says (Br. 13): "That a time arrives when the taxpayer no longer has control over the income does not signify a release of a power to appoint within the meaning of Section 452(c) . . ." But Congress has expressly declared the contrary. Both the House and Senate Committees have said in terms that "A release of a power of appointment need not be express or formal in character." And this illustration is given: "For example, the failure to exercise a power of appointment within a specified time, resulting in the termination of a power of appointment, is taxable . . ." House Report No. 2333, 77th Congress, 2d Session, p. 1661; Senate Report No. 1631, 77th Congress, 2d Session, p. 233. And this is not all. The Commissioner himself has put this very language in his own Regulations. Regulations 108, § 86.2(b), eighth paragraph; quoted on p. 25 of the petition. The Government should not be allowed to blow hot and cold on this question, relying on the Committee Reports and the Regulations to tax future terminations of powers, and ignoring them completely here where a prior termination is involved, and § 452(c), allowing tax-free releases, is applicable.

The Commissioner's Regulations also provide: "For example, if a settlor transfers property in trust for the life of his wife with a power in the wife to appropriate or consume the principal of the trust, the wife has a power of appointment and the release of such a power constitutes a taxable transfer." Regulations 108, § 86.2(b). There is a similar provision in the corresponding estate tax regulation. Regulations 105, § 81.24(b)(1), as amended by T.D. 5239, 1943 Cum. Bull. 1081, 1088. These provisions relate to prospective releases of powers after the release date prescribed in § 452(c) of the Revenue Act of 1942 has expired. But that date has not yet expired, and that section is fully applicable in the present case. The Commissioner's position in his Regulations with respect to such powers is wholly inconsistent with his position here.

Where the legislative declaration is clear as it is here, and the administrative action in formal Regulations is in full accord, the ignoring of legislative mandate and administrative rule in a case where they happen to operate against the Government becomes a matter fully within the proper scope of this Court's supervisory power.

III

The petitioner again refers to the manner in which this case was disposed of in the court below. One of the great contributions of Anglo-American justice has been the development of a high tradition of giving reasons for the disposition of cases. That tradition was not adequately met in this case.

Respectfully submitted,

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January, 1946.